MENG LEONG DEVELOPMENT PTE. LTD. v. JIP HONG TRADING CO. PTE. LTD.

[P.C. (Lord Keith of Kinkel, Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Templeman and Sir Robin Cooke) June 13, 14 & October 15, 1984]

[Privy Council Appeal No. 24 of 1983]

Land Law – Agreement for purchase of property – Sale by vendor to third party – Damages awarded in lieu of specific performance – Appeal against quantum of damages – Leave granted to cross-appeal for specific performance – Damages awarded paid and accepted – Estoppel.

Estoppel – Estoppel by conduct – Contract – Purchaser awarded damages in lieu of specific performance – Damages deposited with stake holder at purchaser's request – Whether purchaser estopped by election from seeking specific performance or appeal.

In this case there had been an agreement for the sale of the property from the appellants to the respondent. The appellants however sold the contractual property to a third party. The respondent applied for specific performance but at the trial it was submitted that specific performance could not be granted as the vendor had already sold the property to the third party. The learned trial judge accepted that submission and awarded damages in lieu of specific performance. He awarded damages of $297,500 and refused a stay of execution. The appellants appealed for the purpose of obtaining a reduction in the damages. In the meantime the respondent applied for and obtained payment of the damages awarded. At the appeal before the Court of Appeal, the Court pointed out that the right to specific performance could not be affected by the sale to a third party with notice and suggested that the respondent should cross-appeal for specific performance and gave them leave to do so. The Court of Appeal dismissed the respondent's appeal on quantum, allowed the cross-appeal and made an order for specific performance – see [1983] 2 M.L.J. 25. The appellant appealed to the Privy Council.

Held, allowing the appeal (Sir Robin Cooke dissenting):

(1) the respondent in this case had chosen to enforce the order made in the trial court immediately after the date of the order and thereby abandoned the right to appeal against the order. If the Court of Appeal had been aware of the payment of damages of $297,500 the Court of Appeal would have been bound either to refuse the respondent leave to cross-appeal or to dismiss the cross-appeal;

(2) the vendor had altered its position to its detriment by raising and paying $297,500. The essential requirements for estoppel by election were satisfied;

(3) the order for specific performance made by the Court of Appeal must be set aside and the order of the trial judge restored.

Cases referred to:

(1) *Cannan* v. *Reynolds* (1855) 5 E & B 301; 119 E.R. 493.
(2) *S. Kaprow & Co. Ltd.* v. *MacLelland & Co. Ltd.* [1948] 1 K.B. 618.
(3) *Re Collie* (1878) 8 Ch.D. 807.
(4) *Ajayi* v. *R.T. Briscoe (Nigeria) Ltd.* [1964] 1 W.L.R. 1326.
(5) *Lagunas Nitrate Co.* v. *Lagunas Syndicate* [1899] 2 Ch. 392.
(6) *United Australia Ltd.* v. *Barclays Bank Ltd.* [1941] A.C. 1, 30.
(7) *Johnson* v. *Agnew* [1980] A.C. 367, 396.

HIGH COURT.

R. Ramason for the plaintiffs

Miss Irene Lim for the defendants.

Ng Liang Poh held a watching brief for purchasers of subject property.

Rajah J.: The salient facts in this case are not in dispute.

By an Option to Purchase in writing dated March 21, 1979 (the Option) and in consideration of a Booking Fee of Two Thousand Dollars paid by the Plaintiffs to the Defendants, the Defendants offered to sell a 2-storey terraced house to be erected on Lot 2388 of Mukim XXIV (the premises) at the price of $152,500/-. It was agreed that the premises was at all material times residential property within the meaning of the Residential Property Act 1976 (the Act) and that the Plaintiff Company was a Singapore company within the meaning of the Act.

It was a condition of the Option that, in order to exercise the Option, the Plaintiffs had to sign a contract for sale and purchase of the premises in the prescribed form (the contract), whereupon the Defendants would have to sign the said contract, and upon the Defendants so doing the Plaintiffs would have to pay the Defendants forthwith 10% of the purchase price less the sum of $2,000/- being the aforementioned booking fee.

On April 23, 1979 the Plaintiffs exercised the said Option by signing the contract prepared by the Defendants' solicitors and forwarded it to them on the same day together with the balance of the 10% of the purchase price. It was not in dispute that as between the parties there was a good and binding contract for the sale and purchase of the premises.

On the April 26, 1979 (AB14) the Defendants' solicitors asked for copies of the Letter of Clearance and the Statutory Declaration referred to under Sections 8(2)(b) and 8(4) respectively of the Act and on April 27, 1979 (AB15) they went on to say that their clients were withholding signing of the contract pending confirmation of the said Letter of Clearance. They further said that if such confirmation was not forthcoming by the April 30, 1979 their clients would treat the Agreement as cancelled. Thereupon on the same day (AB16) the Plaintiffs' solicitors sent a copy of the Letter of Clearance and a copy of the

Statutory Declaration together with Annexure 'A' referred to therein were sent to the Defendants' solicitors. The matter was not allowed by the Defendants to rest there. Their solicitors on May 5, 1979 wrote that their clients, before they countersigned the contract, would require the copies of both the Letter of Clearance and the Statutory Declaration with Annexure 'A' to be duly certified by the purchasers' solicitors as true copies. The letter (AB17) contained a request made for the first time for a certified true copy of the Directors' Resolution authorising and approving the purchase of the premises. However, some time after the receipt of this letter (AB17) by the Plaintiffs' solicitors, the Defendants' solicitors agreed that there was no need for the Letter of Clearance to be duly certified by the Plaintiffs' solicitors.

In their letter May 11, 1979 (AB18) to the Defendants' solicitors the Plaintiffs' solicitors enclosed a certified true copy of the Directors' Resolution which bore the date May 9, 1979 and a photostat copy of the Statutory Declaration (the original being with the Controller of Residential Property) certified by the Plaintiff Company Secretary.

Nothing further was heard until May 21, 1979 (AB20) when the Defendants' solicitors wrote saying "that the copies of Statutory Declaration dated June 23, 1978 certified by the Secretary is not acceptable to our clients". They further said that their clients did not wish to proceed with the sale and refunded the 10% deposit. On May 22, 1979 the Plaintiffs' solicitors insisted by letter (AB21) that there was a good and binding contract. On May 29, 1979 the Defendants in their letter (AB23) repeated what they had said in their letter of May 21, (AB20) and on the following day wrote again (AB24) raising for the first time the non-acceptability of the Directors' Resolution for the reason that it was taken on May 9, 1979 which was after the signing of the contract.

The Plaintiffs on their part were not content to leave matters there. They went back to the Defendants' solicitors by letter dated May 31, 1979 (AB25) enclosing a certified true copy of the Statutory Declaration dated June 27, 1978 by the Controller of Residential Property (The Controller). The response to this letter was by one dated June 2, 1979 (A.26) where the Defendants declared that the matter was closed and that they had treated the sale and purchase of the premises as cancelled as the Plaintiffs had failed to furnish them with a certified true copy of the Statutory Declaration dated June 27, 1978 to their satisfaction within the date-line i.e. May 12, 1979.

On July 4, 1979 the Plaintiffs lodged Caveat No. CV/27207 in the Land Titles Registry against the premises.

On September 17, 1979 the Defendants entered into an agreement with Chew Yim Min and Chou Yim Tat whereby the Defendants agreed to sell and the said Chew Yim Min and Chou Yim Tat agreed to purchase the said property for the sum of $126,500/-.

It was in these circumstances that the Plaintiffs commenced these proceedings against the Defendants for:–

(i) Specific Performance of the Contract.

(ii) An Injunction to restrain the Defendants whether by themselves or their servants or agents from selling, mortgaging or otherwise dealing with the premises.

(iii) Further or alternatively, damages for breach of Contract.

To this the Defendants' defence was that it was a reasonably implied term or condition of the Option that the Plaintiffs, in the event of their exercising the Option, should furnish proof to the satisfaction of the Defendants that they were not precluded under the provisions of the Act from purchasing the premises by complying, within a reasonable time from the date of exercise of the Option, with the following 2 conditions:–

(i) The Plaintiffs had to produce a certificate of clearance by the Controller that they were at liberty to acquire and retain the premises in accordance with Section 8 of the Act.

(ii) The Plaintiffs had to produce a certified copy of the Statutory Declaration made by their secretary or director which had to be filed by them on or before July 1, 1978 furnishing particulars of the citizenship status of each of their members and directors in accordance with section 8(4) of the Act and

the certificate of clearance or to produce a letter by the Controller that such Statutory Declaration had been so filed. They went on to plead specifically that:–

(a) The Plaintiffs by filing their Statutory Declaration with the Controller on July 8, 1978 were out of time;

(b) The Plaintiffs had not to the satisfaction of the Defendants within a reasonable time from the date of exercise of the Option, furnished to the Defendants a certified copy of the Statutory Declaration;

(c) The Plaintiffs had failed to satisfy the Defendants within a reasonable time from the date of exercise of the Option that the requisite Statutory Declaration had been filed within time with the Controller.

At the trial counsel for the Defendants did not press the question of the Directors' Resolution, raised by the Defendants' solicitors towards the latter part of their correspondence with the Plaintiffs' solicitors, and said that her case depended on (1) whether her Statutory Declaration plea would succeed or fail, her point here being that the yearly Statutory Declaration under section 8(4) of the Act had not been filed on or before July 1, 1978, it having been actually filed on July 8, 1978 and (2) the Plaintiffs had or had not furnished the Defendants with a satisfactory copy of the Statutory Declaration.

I found both submissions without merit and dismissed her claim with costs.

In my view, all that matters in this case is that, at the date of the contract the Plaintiffs were a Singapore company within the meaning of the Act and this was conceded by the Defendants. There was no doubt the yearly Statutory Declaration had been filed 8 days out of time. Under the Act, this, in my view, in no way invalidates or affects the contract as such between the parties. As for the point that the Defendants were not furnished by the Plaintiffs with a satisfactory copy of the Statutory Declaration filed on July 8, 1978 there is, in my view, no obligation under the Act for a copy of such a declaration to be furnished by the Plaintiffs to the Defendants. I did not understand what the Defendants were complaining about. They had been given a copy of the Statutory Declaration, declared on June 27, 1978 and filed on July 8, 1978, on May 11, 1979 (AB18) but had not complained until May 21, 1979 (AB20) about the inadequacy of the certification by the Secretary of the Company. One would have thought that the Secretary of the Company would have been the best person to certify as section 8(4) requires that "every Singapore company shall file with the Controller on or before July 1, of each year (as from 1977), a Statutory Declaration made by the Secretary ...".

From the above judgment the defendant appealed to the Court of Appeal. See [1983] 2 M.L.J. 25.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Gerald Godfrey Q.C. (Molly Lim with him) for the appellant.

E.G. Nugee Q.C. (J.S. Trenhaile, Y.R. Jumabhoy & R. Ramason with him) for the respondent.

Cur. Adv. Vult.

Lord Templeman (delivering the majority judgment of the Board): This appeal arises out of a purchaser's specific performance action. The purchaser is the respondent Jip Hong Trading Co. Pte. Limited. The defendant vendor is the appellant Meng Leong Development Pte. Limited. The action was tried by A.P. Rajah J. in the High Court of Singapore. On behalf of the vendor it was submitted at the trial that specific performance could not be granted because the vendor had, since the date of the purchaser's contract, sold the contractual property to a third party who was not before the court. The learned judge accepted that submission and awarded damages in lieu of specific performance. The purchaser's contract price was $152,500, the vendor had spent $38,000 on improvements and there was evidence that at the date of the trial the property was worth $488,000. Accordingly, by an order dated September 8, 1981 A.P. Rajah J. awarded the purchaser $297,500 damages; he refused a stay of execution. By notice dated September 23, 1981 the vendor gave notice of appeal for the purpose of obtaining a reduction in the damages of $297,500 ordered by the judge. The purchaser did not give notice of appeal or cross-appeal against the decision of the judge to deny the purchaser specific performance and to award damages instead. The purchaser shared the mistaken view of

the law of specific performance accepted by the judge. The time allowed by the operative rules of court for the service of notice of appeal expired in October 1981, subject to the power of the court to grant an extension of time.

By a letter dated October 23, 1981 the vendor's solicitors wrote to the purchaser's solicitors saying that the purchaser's solicitors had proposed that the vendor pay the $297,500 damages to the Overseas Chinese Banking Corporation on fixed deposit on a three month basis in the name of the purchaser's solicitors to be held by them as stakeholders and to pay over the deposit to the party who succeeded in the pending appeal together with all accrued interest. By a letter dated October 28, 1981 the purchaser's solicitors confirmed these arrangements but added that:—

". . . . . the agreement was reached on the strict understanding that the said sum of $297,500 was to be paid to us immediately without any further delay.
Therefore kindly let us have your clients' cheque of $297,500 on receipt of this letter."

The plain implication was that if the vendor did not deposit the damages of $297,500 the purchaser would proceed to levy execution for this sum. With a letter dated November 12, 1981 the vendor's solicitors sent to the purchaser's solicitors the vendor's cheque for $297,500 pursuant to the agreement:-

". . . . . that in the event that our clients succeed in the pending appeal and damages payable to your clients are reduced, your clients will only be entitled to a proportionate sum of the interest accrued under the fixed deposit. The balance of the interest is to be paid out to our clients."

The vendor's appeal against the quantum of damages came before the Court of Appeal (Kulasekaram, Lai Kew Chai and Chua JJ.) on August 20, 1982. The court pointed out that the purchaser's right to specific performance at the date of the trial could not have been affected by any sale to a third party with notice and suggested that the purchaser should cross-appeal asking for specific performance. The Court of Appeal gave leave to the purchaser to do so and adjourned the vendor's appeal. The Court of Appeal were not on that occasion, or any subsequent occasion, informed by either party that the damages of $297,500 ordered by the learned judge had already been raised by the vendor and placed on deposit awaiting the outcome of the vendor's appeal as to quantum. By notice of cross-appeal dated September 8, 1982 the purchaser asked that the order of Rajah J. should be varied and that specific performance be substituted therefor. On September 16, 1982 the Court of Appeal dismissed the vendor's appeal on quantum, allowed the purchaser's cross-appeal and made an order for specific performance. By a letter dated September 17, 1982 the vendor's solicitors wrote to the purchaser's solicitors saying that:—

"As your cross-appeal for specific performance . . . has been allowed, kindly release to us our clients' monies held by you as stakeholders together with interest immediately."

The purchaser declined to release the deposited damages of $297,500 but by a summons dated November 5, 1982 applied for an order giving directions for the conveyance of the property to the purchaser, the delivery up of vacant possession and for the damages of $297,500 to be retained until specific performance had been completed and all moneys and costs due to the purchaser had been accounted for. In support of this application the purchaser's managing director swore an affidavit on November 3, 1982 to which he exhibited all the correspondence between October 23, 1981 and November 16, 1981 which related to the deposit of the damages of $297,500. By an order dated November 12, 1982 Lai Kew Chai J. made the order sought by the purchaser's summons. By a notice of motion dated November 17, 1982 the vendor sought leave to appeal to the Judicial Committee against the order for specific performance made by the Court of Appeal and on November 22, 1982 the Court of Appeal gave that leave but refused to stay the order for specific performance. Subsequently the Court of Appeal refused leave to appeal against their order refusing a stay of specific performance. On December 9, 1982 the Board gave special leave to the vendor to appeal against the refusal of the Court of Appeal to grant a stay of execution and granted a stay against the order for specific performance pending the hearing by the Board of the vendor's appeal.

In the appellant's case to the Board, the vendor alleged that the purchaser was not entitled to an order for specific performance because at the trial before A.P. Rajah J. the purchaser had elected to accept damages in lieu of specific performance. The vendor sought leave to adduce before the Board evidence as to what had happened at the trial. Their Lordships declined to give such leave;

no such election appears from the judgment of A.P. Rajah J. or from his notes of evidence.

The documents placed before the Board by the vendor in connection with this appeal properly included the affidavit and exhibits of the purchaser's managing director which disclosed the deposit of the damages of $297,500 and the agreement which had been reached with regard thereto. It was suggested by a member of the Board that the Court of Appeal might not have made an order for specific performance if they had been aware of the deposit of the damages and the agreement. The vendor's counsel, Mr. Godfrey, therefore applied for leave to argue that the purchaser was estopped from seeking specific performance after electing to enforce the order for damages made by the trial judge A.P. Rajah J.

The vendor's application to rely on this estoppel by election was opposed by Mr. Nugee on behalf of the purchaser. All the evidence relevant to estoppel was before the Board and there were no material disputes of fact. After a short adjournment Mr. Nugee was in a position to make submissions concerning estoppel. Accordingly the Board was in a position to decide whether, as a matter of law, the purchaser was estopped from obtaining specific performance but, as Mr. Nugee pointed out, the Board will not, save in exceptional circumstances, permit a point to be taken which has been conceded or not taken before the Court of Appeal especially if, as in the present case, the point is not adumbrated in the relevant case and is put forward for the first time at the oral hearing before the Board. The Board decided to allow the vendor to rely on the argument of estoppel by election.

These proceedings had been bedevilled with mistakes on both sides. The purchaser had been allowed to cross-appeal on grounds which were suggested by the Court of Appeal, in ignorance of the facts. There was then admittedly a month's adjournment, but the attention of the vendor's advisers then, and subsequently, was directed to the problem of whether the purchaser had elected at the trial to accept damages, not to the question whether the purchaser's conduct after the trial gave rise to an estoppel.

The crucial circumstances in the present case were that, if the Board ignored admitted facts which were not made available to the Court of Appeal and which were subsequently put in evidence by the purchaser, and if the estoppel point was good in law, then the Board was in danger of upholding the order of the Court of Appeal for specific performance made *per incuriam* and of approving a result which was unjust and should never have been reached. Any prejudice to the purchaser caused by the fact that estoppel was not adumbrated until hearing of this appeal can be corrected by an appropriate order for costs. Their Lordships consider that the proper course is to decide the issue of estoppel by considering whether it would have been proper for the Court of Appeal to have granted the purchaser an order for specific performance in September 1982 if the Court of Appeal had been aware of all the facts relating to the deposit of damages on the terms imposed by the purchaser.

Mr. Godfrey submitted that after the award of damages by the trial judge, A.P. Rajah J., the purchaser had a choice. The purchaser could either enforce the judgment for damages or appeal to the Court of Appeal to set aside the order for damages and to substitute an order for specific performance. The purchaser elected to take the benefit of the judge's order and force the vendor to provide the damages. The purchaser thereby abandoned the right to appeal and was estopped from asserting any such right thereafter.

In *Spencer, Bower and Turner* "The Law relating to Estoppel by Representation" 3rd Edition (1977), paragraph 310 summarises the doctrine of election as applied to the law of estoppel in these terms:-

> "Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. It is of the essence of election that the party electing shall be 'confronted' with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice."

In the present case the purchaser could not take the damages and obtain specific performance. By demanding and accepting the deposit of the damages the purchaser chose to adopt the order of the trial judge and relinquished the right to appeal for that order to be set aside and for speci-

fic performance to be substituted. The vendor altered its position to its detriment by raising and paying $297,500 on November 12, 1981. The vendor has been deprived of that sum ever since. After the judgment of A.P. Rajah J. the purchaser was indeed confronted with two alternative and mutually exclusive courses of action, namely, to enforce the award of damages or to seek to persuade the Court of Appeal to set aside the award of damages and to substitute the remedy of specific performance.

By procuring the payment of the damages of $297,500 the purchaser accepted the judge's order. If the purchaser had served a notice of appeal seeking specific performance or had informed the vendor that the purchaser intended to seek an order for specific performance from the Court of Appeal, the vendor would have been able to refuse to place the damages on deposit and would have been entitled to renew and to succeed in an application for a stay of execution with regard to the damages pending the hearing of the purchaser's appeal seeking specific performance.

Paragraph 322 of the cited work by *Spencer, Bower and Turner* relating to election in the conduct of litigation is in these terms:–

"Where a litigant has taken the benefit, in whole or in part, of a decision in his favour, he is precluded from setting up in any subsequent proceedings between the same parties, by way of appeal or otherwise, that such decision was erroneous, or, though correct as to the part which was in his favour, was wrongly decided as to the residue."

Mr. Nugee submitted that this statement is not justified by authority but it appears to be good law and good sense. Here the purchaser, by obtaining the deposit of the damages of $297,500, took the benefit of the decision in its favour made by A.P. Rajah J. and thereby precluded the purchaser from arguing that his decision was erroneous.

With commendable speed, Mr. Nugee and those assisting him, prepared and submitted a supplemental case for the respondent denying that the purchaser was estopped by election from appealing against the order of the trial judge. From the thoroughness of that supplemental case and from the detailed oral arguments put forward by Mr. Nugee, for which their Lordships are indebted, it appears that the purchaser's advisers were able to consider and to deal fully with the arguments of the vendor relating to estoppel, despite the tardy appearance of the claim. Mr. Nugee submitted that no election arose. He said the demand by the purchaser for the deposit of the damages of $297,500 ordered by the trial judge was only a prudent method of obtaining security for those damages and did not imply or necessitate abandonment by the purchaser of its right to appeal against the order out of time and to obtain an order for specific performance from the Court of Appeal.

If the Court of Appeal dismissed the purchaser's appeal, then the purchaser would remain entitled to the damages awarded by the trial judge and in the meantime was entitled to security for the payment of those damages. The argument is misconceived. If the purchaser had appealed against the order of the trial judge and sought specific performance, the vendor would have been entitled as of right to a stay of the order for damages and would have refused to raise and deposit those damages pending the appeal. This follows from the fact that if the purchaser had appealed, the property comprised in the contract would have remained security for the obtaining by the purchaser of specific performance and for the alternative and mutually exclusive remedy of damages. The purchaser would not be entitled to a further $297,500 in cash as well as the contractual property by way of security. If the purchaser had appealed the vendor and any person claiming through the vendor would not have been able to dispose of the property pending the appeal. If, in due course, the Court of Appeal were otherwise minded to refuse specific performance, the Court could and would have declined to do so unless the vendor secured payment to the purchaser of the damages of $297,500 by a charge on the property or payment into court or by some other method.

The property was worth $488,000 at the date of trial and the damages were only $297,500. Mr. Nugee said that property values might have fallen between September 8, 1981, the date of the trial, and August 20, 1982, the date of the hearing of the appeal. The purchaser's present eagerness for specific performance indicates that the property did not in fact fall below $297,500 in value. But in any event the risk of loss between September 8, 1981 and August 20, 1982 would have been created by the purchaser's appeal and that risk would have been borne and suffered by the vendor and not by the purchaser. If the property became or was likely to become worth less

than $297,500 the purchaser could at any time abandon the appeal and enforce against the property and any other assets of the vendor the order for damages of $297,500. The purchaser, by appealing, would automatically deprive the vendor, and any other person asserting an interest in the property, of the power to dispose of the property at an advantageous time at the advantageous price of $488,000 while the purchaser retained the right to abandon the appeal if the property became less valuable than the damages. The vendor in those circumstances would be left with the property at its reduced value of less than $297,500 and would still be liable to pay the full damages. Thus, the purchaser by appealing, could ensure that the property then worth $488,000 could not be sold or otherwise turned to advantage pending the appeal.

The purchaser was secured by the forced retention of the property. In these circumstances a demand by the purchaser for the vendor to provide a further $297,500 in cash by way of additional security would have been mere impudence. The purchaser was only entitled to enforce the order for damages in lieu of specific performance if the purchaser abandoned the right to appeal against that order. The purchaser elected to enforce the order for damages by procuring payment from the vendor of the full amount of the damages. It is true that the damages were placed on deposit in the name of the purchaser's solicitors but this was due to the fact that the vendor was pursuing an appeal against the quantum of damages.

The purchaser relied and could only rely on the order of A.P. Rajah J. to enforce payment of the damages of $297,500 by the vendor to the purchaser's solicitors as stakeholders. By relying on that order the purchaser lost the right to dispute it. By demanding and procuring payment of the damages of $297,500 the purchaser abandoned any claim to specific performance. Mr. Nugee submitted that the vendor never even alleged any belief that the purchaser had abandoned a claim for specific performance. But actual intentions and beliefs are irrelevant to the raising of an estoppel in the present case. The facts which raise an estoppel are that the purchaser demanded and accepted payment of the damages, and thus acted in a manner which was only consistent with acceptance of the decision of the trial judge and only consistent with abandonment of the right to appeal against the decision. Factually, it is plain that the purchaser did accept the decision of the trial judge and had no intention of appealing until the Court of Appeal, in ignorance of any estoppel by election, suggested that the purchaser was labouring under a mistake of law in accepting that decision. The vendor had already altered its position by raising and paying $297,500 and the essential requirements for estoppel by election were satisfied.

Next, Mr. Nugee argued that, subject to the purchaser releasing the deposited damages and interest and possibly paying damages to the vendor for any loss caused to the vendor by raising and placing the money on deposit in the first place, the purchaser could reverse the election made in November 1981 and resume the claim for specific performance. But in the absence of any misconduct on the part of the vendor, the court could not permit the purchaser to escape from the consequences of the election constituted by the demand made and enforced for payment of the damages payable pursuant to the order made by the trial judge. There is no equity which assists the purchaser to forego that demand and to cancel that election freely exercised in a manner which the purchaser subsequently regretted.

In a detailed and careful argument Mr. Nugee referred to a number of cases on which he relied by way of analogy for his submission that the purchaser, notwithstanding any earlier election could restore the right to appeal against the order for damages made by the trial judge by offering to release the damages on deposit together with interest and possibly damages. But on examination, the cases on which Mr. Nugee relied did not support the submission.

First, Mr. Nugee referred to the jurisdiction of the Court to set aside a judgment on the application of the person by whom it has been obtained, before or after the time for appealing has expired, and before or after execution. The authorities cited, namely *Cannan* v. *Reynolds*[1], *S. Kaprow & Co. Ltd.* v. *MacLelland & Co. Ltd.*[2] and *Re Collie*[3], are instances where judgment was obtained or action was taken under a mistake and where that mistake could be corrected without injustice. In the present case the purchaser did not make any mistake, except a mistake of law as to the grounds of specific performance and that mistake cannot now be corrected without injustice to the vendor. The authorities do not support the view that a litigant who has elected

to enforce a judgement for damages and to abandon the right to appeal against that judgment may change his mind after the damages have been paid.

Secondly, Mr. Nugee relied on the principle of promissory estoppel and in particular on the case of *Ajayi* v. *R.T. Briscoe (Nigeria) Ltd.*[4] But in that case, and in similar cases, the promise was not intended to be irrevocable and the recipient of the promise did not act to his detriment.

Thirdly, Mr. Nugee relied on the fact that in ordering rescission of a contract for misrepresentation or undue influence the court only insists on substantial restitution accompanied, if necessary, by payment of compensation; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*[5]. There must however be substantial restitution even in such a case where the court is striving by the order of rescission to protect an innocent party against a wrong-doer. In the present case the purchaser exercised an unfettered election to accept the damages payable pursuant to the order of A.P. Rajah J. or to appeal against that order. Moreover substantial restitution is impossible because no one knows what would have happened to the vendor's assets if the vendor had not been compelled by the purchaser to raise and deposit $297,500 by way of damages. It was said that there was no evidence that the vendor had any difficulty in finding the money or that the rate of interest earned on the deposit was any less than the interest which might have been earned by the vendor. If necessary, it was said, there could be an inquiry as to the damages suffered by the vendor in raising and paying and being deprived of the use of $297,500. But it is impossible to put the clock back; the damages would be imponderable and any inquiry would inflict on the vendor uncertainty, delay and expense merely to relieve the purchaser against the consequences of the purchaser's own voluntary conduct in insisting on payment of the damages and enforcing the order of the trial judge.

Mr. Nugee submitted that in any event no election could arise until a final order, not subject to appeal, had been made: – ". . . . on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment:" – per Lord Atkin in *United Australia Ltd.* v. *Barclays Bank Ltd.*[6] at page 30, cited with approval by Lord Wilberforce in *Johnson* v. *Agnew*[7] at 396.

It is true, of course, that the purchaser was not bound to make an election; the purchaser could have appealed against the order of the judge and retained the right to elect between specific performance and damages until after any final appeal. But in that case the vendor could not have been compelled to raise and deposit $297,500. The purchaser chose to elect to enforce the order made by A.P. Rajah J. immediately after the date of that order and thereby abandoned the right to appeal against that order.

Accordingly, their Lordships conclude that if the Court of Appeal had been aware of the payment of damages of $297,500, the Court of Appeal would have been bound either to refuse the purchaser leave to cross-appeal or to dismiss that cross-appeal.

Finally, Mr. Nugee submitted that a cross-estoppel arose because the day after the Court of Appeal gave judgment for specific performance the vendor's solicitors asked for the release of the damages held on deposit. It was said that the purchaser assumed that the vendor was accepting the decision of the Court of Appeal and therefore issued a summons for implementation of the decree for specific performance. However, the purchaser insisted on retaining the damages while pursuing implementation of the order for specific performance and knew full well from the date when the vendor sought leave to appeal to the Board that the decision of the Court of Appeal was under challenge. There was no election by the vendor, no estoppel, and the purchaser by seeking to implement the order for specific performance did not act to its detriment in reliance on any act or omission by the vendor or at all. The purchaser sought to implement the order for specific performance in reliance on the order made by the Court of Appeal. Indeed the events which happened after the judgment of the Court of Appeal only illustrate the justification for the application of the principle of estoppel by election which prevented the purchaser from appealing against the order of A.P. Rajah J. once the purchaser had enforced that order and procured the deposit of the damages. By retaining the damages and also seeking to enforce the order for specific performance, the purchaser was enabled to pursue inconsistent and alternative claims. The vendor was only liable to pay damages or to perform the contract and was not bound to suffer the infliction of both remedies, even with the hope of recovering from the effect of one of them in due course, subject to any order the court might care to make about costs or delay. The vendor

having been obliged by the purchaser to comply with the order to pay damages was harassed by the order for specific performance. Once the damages had been raised and paid and accepted the purchaser was estopped by election from appealing against the order for the payment of those damages.

On behalf of the vendor, Mr. Godfrey argued that the damages awarded by A.P. Rajah J. were excessive and should be reduced. The vendor's appeal to the Court of Appeal for such a reduction had not been heard on its merits. He asked that the issue as to the quantum of damages should be referred back to the Court of Appeal or should be made the subject of an inquiry. He said that the written judgment of A.P. Rajah J. did not explain the basis on which the damages were calculated. Examination of the record, however, makes the matter quite plain. The learned judge rightly decided that damages should be assessed as at the date of trial. Mr. Godfrey said that it was arguable that damages should have been assessed at an earlier date when the vendor repudiated the contract. But that repudiation was not accepted; the purchaser issued a writ for specific performance. There is nothing in this point.

As to the quantum of damages, there was one expert witness called by the purchaser who gave evidence of value at the date of trial. He assessed that value at $488,000. Mr. Godfrey frankly conceded that the judge must have accepted that evidence, deducted from the value of $488,000 the value namely, $38,000 of certain improvements carried out by the vendor, deducted the contract price of $152,500 payable by the purchaser pursuant to their contract of purchase and thus arrived at the damage award of $297,500. The only evidence of value on behalf of the vendor was given by the managing director of the vendor who, *inter alia,* said that adjoining property had been sold for much less than $488,000. The learned judge must have rejected this evidence and preferred the evidence of the expert valuer. The judge was entitled so to do. There are no grounds upon which the Court of Appeal or the Board could interfere with the amount of damages awarded by the trial judge.

In the result, their Lordships will allow the appeal from the Court of Appeal. The order for specific performance made by the Court of Appeal and any consequential orders must be set aside and the order of A.P. Rajah J. restored.

There remains the question of costs. If the vendor had produced to the Court of Appeal the facts relating to the deposit, then the Court of Appeal would have been bound either to refuse to allow the purchaser to cross-appeal or, if the facts had been revealed after leave had been granted, to dismiss the cross-appeal and to refuse to grant specific performance. The vendor's appeal against quantum of damages would have been dismissed. Before the Board, the vendor has succeeded, but only on a ground raised for the first time on the day when the appeal was opened. In the circumstances, their Lordships consider that the orders made by the Court of Appeal with regard to costs should be set aside and that there should be no order for any costs incurred by either party after the trial before A.P. Rajah J.

Sir Robin Cooke (delivering his dissenting judgment): Not being persuaded that this case should be decided on a point never mentioned in its long history until stated by one of their Lordships at the hearing of the final appeal, I have the signal misfortune to differ from the majority and would dismiss the appeal.

At first sight the course taken by the Court of Appeal in suggesting specific performance and giving the purchaser liberty to cross-appeal seems unusual; but that course was apparently not opposed on behalf of the vendor, and the Court records in its reasons for judgment that counsel for the vendor frankly admitted that he saw no reason why specific performance could not have been ordered.

At the lowest, it is a reasonable inference that the parties and their legal advisers in Singapore did not regard the arrangement for payment of the damages to a stakeholder as an election. Indeed, even in the vendor's case before the Judicial Committee, settled by leading counsel in London, the arrangement was nowhere mentioned – and notwithstanding that the subject of election (allegedly at the trial) was by then in the forefront. Such relevant evidence as there is may be incomplete. The Judicial Committee does not have the benefit of any opinion from the Court of Appeal about the significance of the arrangement as between the parties. In all these circumstances it is difficult to see any firm basis for

concluding that, by insisting that the deposit arrangement be carried out, the purchaser induced the vendor to believe that the purchaser had relinquished any claim to specific performance. Moreover, Mr. Godfrey accepted before their Lordships that it was too late to contend that the arrangement amounted to an agreement to forego specific performance.

All this might not matter if there were an overriding rule of law that in no circumstances can a purchaser who has been awarded damages at first instance require, as a term of some arrangement, that the damages be deposited with a stakeholder, or paid into court, without *ipso facto* electing against specific performance. With the greatest respect to those who may favour such a rule, I cannot help thinking that it would go too far.

In the present case, after the initial judgment the vendor applied for a stay, which was refused by the High Court. Next the vendor filed a notice of motion in the Court of Appeal for a stay. The correspondence (letters of 23rd, 28th, 30th October and 4th, 12th and 16th November 1981) shows that a bargain was then reached that, if the damages were paid to a stakeholder, execution of the judgment would be stayed pending the outcome of the vendor's appeal. By previously opposing a stay, except on such terms, the purchaser did not commit itself to executing the judgment. Evidently the purchaser in fact took no step towards execution, nor does there even appear to be evidence of a clear threat of execution. What the vendor gained by the bargain was that the purchaser no longer had the *option* of taking any steps to enforce the judgment (as by winding-up proceedings).

I agree that the principles are correctly stated in the chapter on Election in *Spencer Bower and Turner* on "Estoppel by Representation", 3rd edition, a chapter which may be said to be of special authority, having been substantially rewritten by Sir Alexander Turner. But a theme of the chapter is that election must be unequivocal, the alternative courses of action in truth mutually exclusive. Looking at the known facts of the present case in the light of those tests, I think that to be satisfied that the doctrine applies one should require, like Hamlet, "grounds more relative than this".

Appeal allowed.

Solicitors: *Coward Chance; Freshfields.*

SUN KEE & CO v. CHOP SIN HUA & ANOR.

[P.C. (Lord Diplock, Lord Edmund-Davies, Lord Bridge of Harwich, Lord Brightman, Lord Templeman) October 31, 1984]

[Privy Council Appeal No. 45 of 1982]

Practice and Procedure – Execution of judgment – Order for sale by public auction – Application to set aside sale – R.S.C. 1957, 0.43 r. 11

This was an appeal from the decision of the Federal Court reported at [1981] 2 M.L.J. 327. It concerned the sale of immovable property in Kuala Lumpur pursuant to an order of sale made under Order 43 of the Rules of the Supreme Court to satisfy a judgment debt owed by the appellant to the first respondent. The only question in the appeal was whether the sale was liable to be set aside under rule 11(e) of that order on the ground of a material irregularity in publishing it. The High Court judge was of the opinion that there was no material irregularity and the appeal to the Federal Court was dismissed. The appellants appealed.

Held, dismissing the appeal: their Lordships adopt the reasoning of the Federal Court which carries such conviction that there is no need to repeat it.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Donald Rattree Q.C. (G. Krishnan with him) for the appellants.

Eugene Cotran (B.G. Ee with him) for the 1st respondent.

Lord Diplock (delivering oral judgment of the Board): This appeal concerns a sale of immoveable property in the district of Kuala Lumpur pursuant to an order for sale made under order 43 of the Rules of the Supreme Court to satisfy a judgment debt owed by the appellant to the first respondent. The only question in the appeal is whether the sale is liable to be set aside under rule 11 (e) of that order on the ground of a material irregularity in publishing or conducting it.

The High Court judge, even although the hearing before him was mistakenly conducted on the assumption that section 257 of the National Land Code applied to the sale instead of sections 334 to 339, was of the opinion that there was no material irregularity. The Federal Court, before whom the appeal was conducted on the correct legal basis, were unanimously of the same opinion.

Their Lordships adopt the reasoning of the Federal Court, which carries such conviction that